

The Absence of Complaints of Discrimination (Paragraphs 156-157)

47. In paragraph 156 of its Findings and Conclusions, the NAACP acknowledges, as it must, that no employee or job applicant has complained that KFUD discriminated against him or her on the grounds of race or religion during the License Term. Church Ex. 7 at 10. The NAACP argues, however, that "no one was in a position where they could have been subjected to individualized discrimination, e.g., by applying for a job and being rejected." NAACP's Findings and Conclusions at 67. The Church does not understand this argument. Many people worked at KFUD during the License Term. Numerous employees left KFUD's employ. Many other individuals applied for jobs during the License Term but were not hired. Contrary to the NAACP's suggestion, all of these people could have been subjected to discrimination. The fact that no one ever complained of discrimination is therefore highly significant.

Financial Problems of KFUD (Paragraphs 159-167)

48. The NAACP's statements in paragraphs 159-167 of its proposed findings concerning KFUD's showing that it struggled financially during the License Term are argumentative and inaccurate. Contrary to the NAACP's contention, KFUD's financial statements do not show "reasonably healthy" operations. Rather,

if legacies and bequests are not counted,^{8/} then the operating deficit was over \$120,000 in 1983; almost \$150,000 in 1984; over \$300,000 in 1986; over \$150,000 in 1987; over \$500,000 in 1988; and almost \$600,000 in 1989. As for KFUD-FM alone, its expenses exceeded its revenues by almost \$300,000 in 1989 and over \$300,000 in 1988. Church Ex. 4, Att. 5, at 33, 43. The NAACP tries to belittle the losses at KFUD-FM as "meaningless," but in the real world, they confirm the Church's statement that the FM station "struggled financially." The continued operation of KFUD in the face of such deficits also confirms the extent of the Church's commitment to providing diverse public interest programming to its community.

49. The NAACP's argument that recruitment would not have been costly is contentious and unpersuasive. Because of KFUD's financial constraints, it was surely reasonable for KFUD to rely on cost-effective sources such as Lutheran publications and referrals by current employees to find applicants who were willing to work for jobs that paid less than the broadcast norm. Church Ex. 4 at 6-7; Tr. 487. As for the NAACP's argument that the Church should have "amended" its EEO Program to reflect its financial hardships, there is no mechanism for amending a plan

^{8/} The NAACP has taken the position in this case that KFUD operated illegally -- indeed, should lose its licenses -- because it operated in some ways as a religious station. The NAACP is therefore hardly in a position to argue that because of voluntary bequests and legacies from Church members who support the religious mission of KFUD, the stations were "reasonably healthy."

filed with a granted renewal application so the NAACP's complaint is ridiculous.

Management Involvement in EEO (Paragraphs 168-202)

50. After exhausting its theories concerning a massive conspiracy on the part of the Church, the NAACP makes the entirely inconsistent argument in paragraphs 168-202 of its Findings and Conclusions that management was "out of the loop." Like the conspiracy theory, this contention is based on argument and innuendo rather than an examination of the record. The NAACP's attack on Church president Dr. Ralph Bohlmann is entirely unfair. Dr. Bohlmann operated as would any president of a large organization in delegating management of KFUD to people of demonstrated theological, technical and professional commitments to the mission of the Church, including nondiscrimination and affirmative action.^{2/} Tr. 278-79. Reverend Devantier was similarly operating responsibly as the CEO of KFUD (as well as head of the Church's other communications activities) by supervising operational managers and taking active steps to ensure these managers' commitment to EEO. Church Ex. 7 at 9. Reverend Devantier testified that he "discussed with each of the General Managers during the License Term, the Stations'

^{2/} The NAACP's description of Reverend Dr. Bohlmann's testimony in paragraph 172 of its Findings and Conclusions is inaccurate. Dr. Bohlmann stated that he signed the renewal applications because the forms had been prepared by trustworthy people and appeared to be in order, as well as because he was proud of KFUD's track record and commitment to non-discrimination. Church Ex. 1 at 2; Tr. 278-79.

commitment to equal opportunity and the desirability of hiring minority employees." Church Ex. 7 at 9-10; see Tr. 824, 826. The NAACP argues that the record contains no evidence of the "depth" of these discussions, but this complaint has no force whatsoever. If the NAACP believed there was some problem with the "depth," it should have cross-examined Reverend Devantier on the issue. It did not, however, do so, and it should not now be permitted to manufacture false findings.

51. The NAACP's contention that Reverend Devantier "failed to act" on Thomas Lauher's March 1989 memoranda is (a) false; and (b) based on a rambling, argumentative and unobjective account of those memoranda. As both Reverend Devantier and Thomas Lauher testified, Reverend Devantier advised Mr. Lauher to proceed to do what needed to be done to assure continuing EEO compliance. Church Ex. 6 at 3; Church Ex. 7 at 10; Tr. 180 (Lauher testimony); Tr. 855 (Devantier testimony). The NAACP did not even attempt to impeach this testimony. Moreover, as a result of Mr. Lauher's memoranda, Reverend Devantier notified the Standing Committee of the Church's Board for Communications Services (assigned by the Church to supervise KFUD in 1987) of the "importance of adhering to laws and regulations pertaining to the Federal Equal Employment Opportunity programs." Tr. 858-59; Church Ex. 7 at 10. Try as it might in paragraph 198 of its proposed findings, the NAACP cannot demean this evidence that Reverend Devantier acted on the basis of Mr. Lauher's memoranda to ensure that KFUD complied with the EEO Rules.

52. The NAACP's descriptions of Mr. Lauher's two memoranda of March 1989 are argumentative, jumbled and internally inconsistent. For example, the NAACP argues that Mr. Lauher was aware of a "plethora" of EEO violations (paragraph 183), but then admits that he enumerated only three (paragraph 188).^{10/} The NAACP's argument in paragraph 193 that Mr. Lauher "must have known" that KFUE was not taking the steps which were not "checked" in the March 15 memorandum is totally speculative and contrary to the evidence in the record. Both the March 15 memorandum itself and Mr. Lauher's testimony stated that the failure to check an item meant only that the issue was "being reviewed."^{11/} See, e.g., the language from the March 15, 1989 memorandum quoted by the NAACP itself in paragraph 192 of its proposed findings. For an objective description of these memoranda -- stripped of baseless comments about who was a "hero"

^{10/} In quoting from Mr. Lauher's March 9, 1989 memorandum in paragraph 182 of the NAACP's Findings and Conclusions, the NAACP omits a statement that Mr. Lauher understood that Reverend Devantier had "received a verbal report previously from the Director of Broadcast Ministries," Kenneth Lombardi, about EEO. Church Ex. 7, Att. 5, at 1. As is generally the case in its Findings and Conclusions, the NAACP refuses to acknowledge the Church's EEO efforts by simply disregarding the record evidence.

^{11/} Note 35 to paragraph 193 of the NAACP's Findings and Conclusion is wrong. Reverend Devantier testified that he did not recall whether letters sent to interviewees who were not selected contained the reasons they were not selected. Tr. 813.

and the like -- the Presiding Judge is referred to paragraphs 75-79 of the Church's proposed findings.^{12/}

53. In paragraphs 200-202, the NAACP purports to describe the Church's "real" reaction to Mr. Lauher's memoranda. Once again, however, the NAACP offers argument and innuendo rather than a description of the record facts. In paragraph 200, the NAACP comments on internal position descriptions about which it never asked any questions or gave the Church the opportunity to comment, which were never used during the License Term, and which had no effect on KFUE's hiring during the License Term. As noted repeatedly above, this kind of blind-side attack should be disregarded as unfair and unreliable. In paragraph 202, the NAACP inaccurately portrays KFUE's hiring efforts after Mr. Lauher's memoranda by lumping together hiring of full-time employees with KFUE's use of Seminary students in a work/study program, and by failing to give KFUE credit for recruiting through Lutheran publications or through employee referrals. For an accurate description of KFUE's augmented efforts after Mr. Lauher's memoranda, the trier-of-fact is referred to paragraphs 83-89 of the Church's proposed findings.

^{12/} The argument in paragraph 190 of the NAACP's Findings and Conclusions that the Church is somehow "responsible" for anything that non-party witness Mr. Lauher said at hearing because of Church counsel's "participation" in Mr. Lauher's pre-trial testimony is ludicrous.

Arnold & Porter's Role for KFUD (Paragraphs 203-217)

54. Paragraphs 203-217 of the NAACP's Findings and Conclusions, concerning the Church's reliance on Arnold & Porter, are biased and unreliable. Nothing in paragraphs 205-206 shows, or could show, that Dennis Stortz was aware in September 1989 that he should explicitly state in the KFUD renewal applications that the Church-owned stations had religious requirements for certain jobs. As the NAACP acknowledges in paragraph 205 of its findings, Ms. Cranberg did not raise this issue in September 1989. Comments by Mr. Lauher to Ms. Cranberg many months earlier -- described out of context in the NAACP's paragraph 206 -- have nothing whatsoever to do with whether the EEO policy in the renewal applications needed to mention these requirements.

55. As for the NAACP's incomplete descriptions of certain Arnold & Porter client advisories and a letter of April 4, 1989, the NAACP distorts the record by failing to put them in a chronological context in the record. NAACP's Findings and Conclusions at 87-92. The NAACP is also wrong to contend that the trier-of-fact can take "official notice" of the accuracy of these client advisories, or of a letter of April 4, 1989. These are simply not matters about which official notice is appropriate.^{13/}

^{13/} For a much fuller description of the relevant First Amendment law, and of the FCC's various EEO policies during the License Term, the trier-of-fact is referred to paragraphs 131-144, 149-153 and 169-171 of the Church's Findings and Conclusions.

56. The NAACP's paragraph 210 is wholly inaccurate. Dennis Stortz's testimony clearly implies that he viewed the Arnold & Porter letters as "form letters" when he received and reviewed them. Church Ex. 4 at 13. Contrary to the NAACP's claim, Mr. Stortz did not know whether Arnold & Porter's bills included charges for these client advisories. Tr. 550. The NAACP's comment in paragraph 213 about what "apparently" transpired between Mr. Lauher and Ms. Cranberg is entirely speculative and not based on any record evidence. Moreover, the NAACP's comment about whether the Church sought a second opinion concerning Arnold & Porter's advice in late 1992 is wholly irrelevant and relates to conduct after the end of the License Term.

Purported Misrepresentations By KFUD (Paragraphs 218-290)

57. The NAACP's litany of alleged "misrepresentations" by the Church is argumentative and illogical. As stated in the Church's proposed conclusions at paragraphs 184-186, a statement by the Church does not constitute a misrepresentation unless it can be shown by evidence that is clear, precise and indubitable that the statement was both false and made with an intent by the Church to deceive. Riverside Broadcasting Co., 56 R.R.2d 618, 620 (1984) (citing Overmyer Communications, Co., 56 F.C.C.2d 918, 925 (1974), quoting Mammoth Oil v. United States, 275 U.S. 13, 52 (1927)). See also Fox River Broadcasting, Inc., 93 F.C.C.2d 127, 129 (1983); Scott & Davis Enterprises, Inc., 88 F.C.C.2d 1090, 1099 (Rev. Bd. 1982). In most cases, the statements on which the NAACP focuses are true. And even in the few instances where the

NAACP lists a statement that has a minor error, there is absolutely no evidence of any intent to deceive.^{14/}

58. The Church frankly does not understand the NAACP's contention in paragraph 223 (Purported Misrepresentation #1) that it was somehow inconsistent for the Church to identify Reverend Devantier as the person responsible for implementation of KFUE's EEO program in September 1989 and to state that turnover in KFUE's general managers made compliance with EEO requirements more difficult. The evidence showed that Reverend Devantier was identified as the responsible person because, as of September 1989, he was KFUE's CEO, the newly-hired manager of KFUE(AM) had not started working, and no permanent general manager of KFUE-FM had been hired. Church Ex. 4 at 16-17; Church Ex. 7 at 10-11; Tr. 860-861 (Devantier testimony that had there been a general manager at the time, his or her name would have been listed on the EEO program). This is in no way "inconsistent" with the fact that KFUE's general managers turned over frequently from 1986-1990, and is actually a good example of that phenomenon. Reverend Devantier needed to be listed in KFUE's renewal applications because operational management was in fact "turning-over" during the last half of 1989.

^{14/} The NAACP's strategy of calling a "misrepresentation" any minor error in a large set of pleadings filed by the Church is not only contrary to the law set forth in paragraphs 184-186 of the Church's Findings and Conclusions, but also would subject the Church to a standard of "letter perfect" accuracy which is unreasonable and far higher than that imposed on other licensees.

59. The NAACP's Purported Misrepresentations ##2 and 3 are based on alleged inconsistencies between KFUCO's religious qualifications for selecting individuals for certain positions, and descriptions of duties in internal position descriptions which, in the NAACP's view, do not amount to "religious duties." The NAACP's argument has no merit. Some of the internal position descriptions (e.g., Manager of FM Business Affairs) were never used during the License Term. More important, it is pointless for the NAACP to speculate about descriptions of job duties -- what was included and what was not -- when it never questioned Church witnesses about those matters. One perfectly reasonable explanation for the contents of internal job descriptions is that someone at the Church simply did not list each and every job function in each job description, including duties that the NAACP might concede were "religious." This certainly happens in personnel offices and shows nothing sinister. The Commission can surely not replace the Church's judgments as to the appropriateness of religious requirements with those of the NAACP without violating fundamental First Amendment principles. In sum, for a variety of reasons, the NAACP's argument is wrong and certainly does not establish any intent to deceive the Commission by the Church.^{15/}

^{15/} The NAACP also complains about statements in the 1982 renewal applications. These complaints are contained not only in Purported Misrepresentation 2, but also in Purported Misrepresentations 4, 6, 10, 12, 14, and 17. These statements were made outside the License Term and were never mentioned in the HDO. The Church was never put on notice that it must defend its practices in 1982 at the hearing.

(continued...)

60. Purported Misrepresentation #3 is also apparently based on KFUD's alleged "failure" to disclose in its renewal application that it required knowledge of classical music for certain positions and that it had a work/study program with Concordia Seminary. Dennis Stortz explained why he did not explicitly mention these qualifications in the renewal applications. Church Ex. 4 at 17-18. Specifically, a sentence in the applications stated that: "When vacancies occur, it is the policy of KFUD and KFUD-FM to seek out qualified minority and female applicants." Mr. Stortz believed that this sentence was consistent with the use of various employment criteria to find "qualified" applicants. Mr. Stortz further believed that the Commission was well aware that KFUD had a close connection with the Seminary, especially given that KFUD(AM) had originally been licensed to the Seminary. The NAACP does not and cannot explain why Mr. Stortz's explanation was in any way unreasonable, much less why the statements show some sort of intention to deceive. Once again, the NAACP is argumentative and wrong.

61. Purported Misrepresentations ##4 and 5 are based on the NAACP's disagreement with the Church's claim in its renewal applications that KFUD had a positive, continuing program in

¹⁵/(...continued)

The NAACP's attempt to attack KFUD's actions during 1982 is improper and once again shows the lengths to which the NAACP has needed to go to find anything allegedly untoward in the Church's conduct. The NAACP's allegations are totally irrelevant and should be stricken. See Arizona Mobile Telephone Co., 93 F.C.C.2d 1147, 1153 (1983) (applicant's potential lack of candor in a previous transfer application could not be basis of adverse finding in hearing on subsequent transfer application absent a designated issue).

September 1989 to ensure the realization of equal employment opportunity. KFUD was in fact committed to equal opportunity, as shown in paragraph 41 of the Church's Findings and Conclusions quoting the EEO policy. Moreover, as of September 1989, KFUD was taking a number of steps to attract minorities. See, e.g., Church Ex. 4, Atts. 13 & 14; see also Church's Findings and Conclusions at 49-52. Most important, the evidence at the hearing showed that all of the responsible Church officials believed the Church was committed to equal opportunity and had a program in place to further that commitment. The NAACP has not shown, and cannot show, that the Church officials did not have this belief. Thus, the statement in the renewal application was true and was certainly not a statement that the Church knew to be false or made with the intention of deceiving the Commission.

62. As for Purported Misrepresentations ##6 and 7, the NAACP apparently is arguing that the Church deliberately lied when it stated that it was the responsibility of all persons involved at KFUD to ensure that the EEO policies and program were upheld. There is not a shred of evidence in the record that this statement was false, and the NAACP has pointed to none. The NAACP argues that the statement that all persons were responsible to ensure that EEO policies were upheld was somehow inconsistent with KFUD's statement that turnover in management made compliance more difficult. This is nonsense. The fact that turnover made it more difficult for managers to meet their responsibilities to ensure EEO compliance has nothing to do with whether they in fact had such responsibilities. In sum, the statement in the

applications about which the NAACP complains was true and was therefore certainly not a misrepresentation.

63. The NAACP's Purported Misrepresentations ##10 and 11^{16/} relate to a true statement in the 1989 renewal applications that KFUD's employment application form contained a certain notice. As of the date of the applications, the employment application did in fact contain this notice. Church Ex. 4, Att. 13. The NAACP therefore has no basis to allege some sort of mistake, much less a "misrepresentation." The fact that the notice may have been inadvertently dropped for a period between 1985 and mid-1989 certainly has no bearing on whether there was a misrepresentation in September 1989.

64. As its Purported Misrepresentations ##12 and 13, the NAACP takes issue with Dennis Stortz's determination to leave language in the renewal applications stating that "(w)hen vacancies occur, it is the policy of KFUD and KFUD-FM to seek out qualified minority and female applicants." But as the NAACP acknowledges, Mr. Stortz believed this statement to be true at the time of the report, i.e., September 1989. See NAACP's Findings and Conclusions at 98. The NAACP may erroneously disagree with Mr. Stortz's opinion, but that is not the point. The NAACP did not and cannot make any showing that Mr. Stortz lied about his belief, and its allegation of "misrepresentation" is therefore baseless.

^{16/} The Church was unable to find any Purported Misrepresentations numbered 8 or 9 in its copy of the NAACP's Findings and Conclusions.

65. The NAACP's Purported Misrepresentations ##14 and 15 relate to a statement in the 1989 renewal application to the effect that any employment services with which KFUD dealt were non-discriminatory. There is no evidence that any service contacted by KFUD (e.g., Roth Young Personnel, Snelling & Snelling, Sales Recruiters Irvin Edwards) was in any way discriminatory. See Tr. 188-89; Church Ex. 4 at 14-15; Church Ex. 4, Att. 14; see Church's Findings and Conclusions at 50. Thus, the statement in the renewal application was true and was certainly not some sort of intentional "misrepresentation."

66. The NAACP's attempt to concoct Purported Misrepresentation #16 is, once again, an attack on a true statement and is therefore baseless. The NAACP contends that it was a "misrepresentation" to state that a copy of a reply form was a "sample" of the ten forms actually sent by KFUD. See Church's Findings and Conclusions at 50 for a description of these forms. Webster's New World Dictionary (Third College Edition) defines "sample" as an item "taken or shown as representative of a whole thing, group, species, etc." The form was therefore a "sample," and the NAACP's complaint is without merit.

67. The NAACP's Purported Misrepresentations ##17 and 18 are a baseless attempt to make a minor inaccuracy into some sort of intentional "misrepresentation." The 1989 renewal application stated that KFUD's advertisements included an "EOE" notice. Mr. Stortz stated that it was KFUD's policy to include these notices and that any omission of the notice was an inadvertent error.

Church Ex. 4 at 12 n.3; Tr. 777-81. The NAACP has not shown and cannot show that this is false. Many advertisements on the same page as KFUD's Broadcasting Magazine advertisement did not have EOE notices. Church Ex. 4, Att. 9, at 1, 3, 8. Contrary to the NAACP's suggestion, the fact that Dennis Stortz may have himself once made such an inadvertent error provides no evidence whatsoever about KFUD's policy or about whether errors were inadvertent.

68. The NAACP's Purported Misrepresentation #19 is yet another example of an attack on a true statement that the NAACP wants to claim is some sort of intentional misrepresentation. The statement in question, from an EEO Supplement filed by Arnold & Porter for the Church and dated December 29, 1990 (M.M. Bur. Ex. 2), accurately describes an identical letter sent to ten recipients in July 1989, all contained in the record as Church Ex. 4, Att. 14.^{17/} The statement in the pleading then goes on to add, again accurately, that none of these ten letters resulted in any minority referrals. For some reason, the NAACP contends that these two accurate statements somehow constituted intentional "misrepresentations." This is nonsense.

69. The discussion of the NAACP's Purported Misrepresentation #20 in paragraph 233 of its Findings and Conclusions is, once again, a groundless attack on a true

^{17/} In quoting the language of the letter, the NAACP places ellipses where the letter contained an advisory that KFUD was an EEO employer. Church Ex. 4, Att. 14. Once again, the NAACP refuses to acknowledge the Church's efforts by distorting the record.

statement. The statement accurately describes KFUD's relationship with the Lutheran Employment Project, as described in the record at Church Ex. 4 at 15, and Tr. 754. See Church's Findings and Conclusions at 51-52.

70. The NAACP's Purported Misrepresentation #21 in paragraph 234 of its Findings and Conclusions relates solely to KFUD's alleged conduct in contacting various employment services and educational institutions subsequent to the License Term, indeed subsequent to December 29, 1992. This is well beyond the scope of the HDO and beyond the scope of any evidence which the Church introduced, or reasonably believed it needed to introduce.

71. Once again, the NAACP's second Purported Misrepresentation #21 (in paragraph 235 of its proposed findings) is an attack on a true statement that KFUD had "initiated" a policy as of December 29, 1989, of advertising openings in the St. Louis Argus. The only two openings subsequent to this date during the License Term were in fact advertised in the Argus, as the NAACP appears to concede. NAACP's Findings and Conclusions at 101.

72. The NAACP's final attack on statements in the EEO Supplement, Purported Misrepresentation #22, is again illogical. The statement at issue reports that a "data form" had been put into use at the station. The data form was indeed put into effect in July 1989 by virtue of a cover memorandum from then FM General Manager Thomas Lauher. See Church Ex. 4, Att. 13; Church's Findings and Conclusions at 49-50.

73. The NAACP's Purported Misrepresentations ##23-45 all relate to either (a) alleged inconsistencies between statements in pleadings at the Commission and internal job descriptions at KFUD or (b) purported inconsistencies within internal job descriptions between listed job "duties" and listed job "requirements." For reasons stated above, this attack on KFUD's internal job descriptions is wholly unfair and unjustified. Some of these descriptions were never used during the License Term. Moreover, it is pointless speculation to comment on descriptions of job requirements and duties in these internal descriptions -- what was included and what was not -- in the absence of questioning to a witness about the matter. As discussed above, there are numerous explanations for any alleged inconsistencies, none of which are sinister. Without a foundation of supporting witness testimony, there is no basis for arguing that the internal descriptions were entirely complete or accurate or that KFUD's statements in pleadings about actual requirements were in any way inaccurate, much less that the Church made intentional "misrepresentations."

74. The NAACP's Purported Misrepresentation #46 is, once again, an attack on a true statement. The statement was that KFUD had drawn on multiple referral sources throughout the License Term. The record shows this was true. See Church Ex. 4, Att. 6. It is irresponsible for the NAACP to claim -- without one shred of record support -- that the Church somehow "knew" that this was a lie.

75. The NAACP's Purported Misrepresentation #47 is really an unfocused and baseless attack on the Church's statement that it had placed advertisements during the License Term in Broadcasting Magazine. Again, this statement is true, and not some sort of intentional "misrepresentation." The NAACP correctly notes that the Church's statement contained a minor inaccuracy because it said that KFUD filled job openings in both the Sales and Management categories through Broadcasting Magazine during 1987, but there is no evidence in KFUD's records of a salesperson hired during that year through Broadcasting Magazine. Once again, however, there is no basis whatsoever for claiming that this minor error was made intentionally, much less with the intent to "deceive" the Commission.^{18/}

76. The NAACP's Purported Misrepresentations ##48-52 are groundless attacks on essentially accurate statements in a February 1990 pleading filed by Arnold & Porter on behalf of the Church concerning advertisements in the St. Louis Post Dispatch (#48); use of the St. Louis Broadcast Center (#49); use of the Lutheran Employment Project of St. Louis (#50); letters sent to employment agencies in July 1989 (#51); and advertisements in the St. Louis Argus (#52). The evidence at hearing established that KFUD did in fact use the Post Dispatch (Church Ex. 4, Att. 6; Church Ex. 4 at 11-12); the St. Louis Broadcast Center (Church

^{18/} The NAACP, as noted above, has two Purported Misrepresentations labelled #21. The Church assumes that this was just a mistake -- everyone makes some. Under the NAACP's theory, however, there would apparently now be evidence that the NAACP is making "misrepresentations" to the Commission.

Ex. 4 at 14-15 n.5; Tr. 613-614; Church Ex. 4, Att. 6); and the Argus. See ¶ 71, supra, relating to second Purported Misrepresentation #21). KFUEO also did in fact send the letters to employment agencies described in the pleading. See ¶ 68, supra, relating to Purported Misrepresentation #19. The NAACP lamely argues that the Church's statements about these recruiting sources were somehow "misleading" because they did not explain as much about their use as the NAACP now thinks was appropriate. The NAACP's criticisms of the pleading are, however, after-the-fact quibbles and in no way show that the statements in the pleading were inaccurate. More important, the NAACP does not show, and cannot show, that any mistakes about such details were made with any intention to deceive.^{19/}

77. In alleging that there was a Purported Misrepresentation #53, the NAACP focuses on a statement by the Church that "Reverend (Otis) Woodard has referred minority applicants to KFUEO." The NAACP also cites to a later pleading by the Church dated September 21, 1992, where it states that "Reverend Woodard (was) asked to send applicants to the stations" (M.M. Bur. Ex. 11 at 13). The NAACP does not and cannot claim, however, that KFUEO did not contact Mr. Woodard's Outreach Ministry. See Church Ex. 11; Tr. 1093-95. Insofar as the NAACP is complaining about the statement that Mr. Woodard

^{19/} Insofar as the NAACP complains about an alleged failure to place ads in The Sentinel subsequent to the License Term, its complaints are beyond the scope of the HDO. The NAACP's criticisms should therefore be stricken or disregarded as irrelevant.

referred people who actually became candidates during the License Term -- as opposed to referring people who chose not to fill out applications -- the Church submits that this is an incredibly minor quibble. See Church Ex. 4, Att. 15, at 24 (Outreach Ministry "referred prospective candidates, none chose to fill out applications"). There is no warrant at all for calling this minor semantic quibble an intentional "misrepresentation." As noted above, it is unreasonable and unfair for the NAACP to blow a point like this up into some sort of effort or "scheme" to deceive the Commission.

78. The NAACP's Purported Misrepresentation #54 is just plain silly. The statement at issue is an accurate statement about full-time hires from Concordia Seminary, which the NAACP does not even question. The fact that the statement in question does not also report on the part-time work/study program with the Seminary in no way shows any "misrepresentation."

79. The NAACP's Purported Misrepresentations ##55-57 all relate to statements in pleadings to the same effect -- that one of the reasons that KFUD used Concordia Seminary students for part-time work/study positions was that KFUD was housed rent-free on the Seminary campus. There is, however, nothing inaccurate -- much less intentionally deceptive -- about the Church's explanation. The Church has consistently explained that KFUD and the Seminary each play an integral role in the achievement of the other's goals. See Church's Findings and Conclusions at 13-18. The Church has also been consistent in explaining that the mutual benefits of the arrangement included rent-free studios for KFUD

on the Seminary campus and the opportunity for Seminary students and their wives to train in the use of radio as a medium in the Church's ministry. The NAACP misses the mark when it attacks the legitimacy of the argument that KFUD was benefitted by not having to pay rent and argues that it is some sort of "misrepresentation." As shown in the financial statements of KFUD (Church Ex. 4, Att. 5), KFUD was treated as a separate entity for financial purposes. The financial statements show no rental payments to the Seminary, thereby allowing KFUD to show lower operating deficits during the License Term. Obviously, if KFUD had to rent studio space from a third party, it would have been injured financially. The NAACP does not and cannot show that this did not benefit KFUD. The NAACP also errs in criticizing KFUD's statement that it used Seminary students because they were willing to work for low salaries. Contrary to the NAACP's suggestion, Dennis Stortz testified that he had an idea as to what other stations paid (Tr. 808-09), and as Operations Manager of KFUD for the entire License Term, he was surely competent to make the statement that KFUD was not competitive. Moreover, it is hardly surprising that a work/study program involving part-time work for students is less expensive than hiring full-time announcers.

80. The NAACP's Purported Misrepresentations ##58-60 are really based on one claim by the NAACP. KFUD stated that it required knowledge of classical music for certain positions, but the NAACP believes that there was in fact no such requirement. Once again, the NAACP presents a contentious argument rather than

a fair and objective portrayal of the facts. For a fair description, the trier-of-fact is referred to paragraphs 92-108 of the Church's Findings and Conclusions. It is important to note several points that the NAACP does not even contest:

(a) KFUE believed that it was essential or highly desirable for announcers on KFUE-FM to be knowledgeable about classical music. The NAACP nowhere does, or can, question the legitimacy of this belief. The NAACP focuses only on the qualifications for sales positions.

(b) The FM station's initial sales representative, Concert Music Broadcasting Sales ("CMBS") recommended that the station seek sales people with knowledge of classical music. See NAACP's Findings and Conclusions at 112. CMBS's principal, Peter Cleary, testified that he told KFUE's CEO, Reverend Devantier, as well as others at KFUE, that KFUE-FM should seek salespersons with that qualification. Tr. 217, 220-21, 873. Both Reverend Devantier and Dennis Stortz testified that they took this advice and looked for salespersons with knowledge of classical music wherever possible -- as any reasonable businessperson would no doubt have done. The NAACP's argument, stripped to its essence, is that these two individuals lied when they stated that they took CMBS's advice. The Church believes that the trier-of-fact, having had the opportunity to observe these two individuals, will have no difficulty rejecting the claim that they are liars.

(c) KFUE hired fourteen individuals to fill sales positions during the License Term. There is no evidence whatsoever that KFUE believed that the requirement for

familiarity with classical music would have a negative impact upon minorities or would disqualify members of any race. Indeed, it should be noted that Caridad Perez, a minority woman, was hired as a salesperson with such experience during the License Term. Tr. 649-50, 763; Church Ex. 4 at 12. Moreover, there is no evidence that any minority applicant was ever rejected for any position at KFUE-FM because he or she lacked knowledge of classical music, or that any potential minority applicant was ever discouraged from applying because of the requirement for a familiarity with classical music.

81. The NAACP's discussion of the classical music requirement is also based on unreliable evidence and has many inaccuracies. To point to only the most important problems:

(a) The NAACP relies heavily on the testimony of Jan Hutchinson. Ms. Hutchinson's "knowledge and belief" as to which salespersons had familiarity with classical music is unreliable and cannot be credited. Ms. Hutchinson's testimony was not credible as she stated erroneously (i) that she had been hired in 1984 by KFUE-FM rather than, as was true, by CMBS (compare NAACP Ex. 7 at 1 with Tr. 222-23 & 225 (Peter Cleary testimony that Ms. Hutchinson was a CMBS employee)); (ii) that Tom Jackson was KFUE-FM's general sales manager, when in fact Mr. Jackson worked for CMBS (compare NAACP Ex. 7 at 1 with Church Ex. 5 at 4 and Tr. 212); (iii) that KFUE-FM became commercial in 1982, when in fact it was 1983 (compare NAACP Ex. 8 at 2 with Church Ex. 5 at 4); and perhaps most significant, (iv) that certain employees did not have classical music experience when in fact they did (compare

NAACP Ex. 7 at 1 with Tr. 645 (Charlotte Akin interned at a classical music radio station) & 647 (Bern Hentze had classical music experience)).

(b) The NAACP also relies heavily on internal position descriptions at KFUD which, as noted repeatedly above, the NAACP merely dumped into the record and never asked any witness about.

(c) The NAACP's contention that the Church was somehow "illogical" in claiming that salespersons needed to be familiar with classical music is unconvincing and beside the point. The principal of CMBS, Peter Cleary, believed that such a requirement was appropriate and so informed KFUD. The NAACP does not and cannot show that Mr. Cleary was "illogical" merely because two of its witnesses disagreed with Mr. Cleary's expert view. The Commission can certainly not second-guess Mr. Cleary's expert judgment about appropriate qualifications. More important, it is beside the point whether there is disagreement about whether Mr. Cleary's judgment was correct -- the important point is that he told KFUD to look for certain qualifications.

(d) The NAACP is wrong to argue that it was somehow illogical for Dennis Stortz to testify that turnover in the sales force was great and economic pressures forced KFUD to hire replacements quickly and thus sometimes settle for people who had less knowledge of classical music than KFUD might have desired. The NAACP argues that Mr. Stortz's testimony was inconsistent with the Church's statement that it received a large number of qualified "write-in applicants each year" from throughout the United States. The Church does not understand why this is

inconsistent. The large number of write-in applicants were for all positions, and not necessarily for sales positions. Thus, KFUE still had to scramble to hire salespersons on short notice.

82. The NAACP's Purported Misrepresentation #61 is a baseless attack on a true characterization of a copy of a July 18, 1989 letter as a "sample." See the discussion of Purported Misrepresentation #16 in ¶ 66, supra.

83. The NAACP's Purported Misrepresentation #62 does not even accuse the Church of deliberate deceit about any matter. Rather, the NAACP merely disagrees with KFUE's statement that a certain data form was not used in late 1989 because of turnover in managerial personnel. Try as it might, however, the NAACP cannot show that this statement is false, much less a deliberate lie. The general manager positions at both KFUE(AM) and KFUE-FM were vacant during all or most of the period in question. The fact that Reverend Devantier and Dennis Stortz needed to fill in for general managers does not in any way show that there was no turnover.

84. As for Purported Misrepresentations ##63-65, the NAACP merely takes issue with the Church's statements that certain employees needed to be familiar with the Lutheran Church or its doctrines or practices. The NAACP does nothing, however, to show that these statements were false, much less deliberate lies. Contrary to the NAACP's contention, Mr. Stortz testified only that knowledge of the Church calendar was an example of religious knowledge that receptionists should have. Tr. 735-36. Mr. Stortz also testified that the necessary knowledge could not be